



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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September 27, 2012

T&R Farms Inc
Attn: Ron Reimann
Reid Reimann
1120 Klundt Rd
Pasco WA 99301-9710

RE: Water Right Change Application No. CS3-22005C(B)@3 (BENT-12-01)

In accordance with RCW 90.80.080 the Department of Ecology (Ecology) has reviewed the Record of Decision (ROD), and Report of Examination (ROE), and all comments, protests, objections and other relevant information submitted by the Benton County Water Conservancy Board (Board) for the above referenced application for change.

The Department of Ecology **REVERSES** the decision of the Board and the subject change is **DENIED**.

- 1) The information received by Ecology on May 21, 2012, on the Request for Administrative Confirmation or Division of a Water Right Form for Water Right No. CS3-22005C(B)@2 between Sandpiper Tree Farm and T&R Farms is not legally sufficient to support a final determination and division of the water right at hand. The Board facilitated the submittal of the form and the ROE assumes the administrative request would be processed as submitted prior to the change authorization being decided by Ecology.

The administrative division request cannot authorize a change, pursuant to RCW 90.03.380 or 90.44.100, but can only administratively split the water right where all apportioned quantities and acres must equal the quantities and acres of the originating water right. From the information submitted on the form, it appears that the number of acres increases as a result of the administrative division request. Ecology cannot confirm the administrative division request as currently submitted; additional information is needed.

Because the Board assumed the administrative confirmation or division of CS3-22005C(B)@2 was finalized, the Board only performed an extent and validity and annual consumptive quantity (ACQ) analyses on a portion of the water right, as required under RCW 90.03.380.

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- 2) There is insufficient evidence in the Board's ROE and supplemental information to support a Determined Future Development (DFD) exception to relinquishment under RCW 90.14.140(2)(c). In this matter, a finding of DFD would provide an exemption to relinquishment and lead to an ACQ calculation based on the time such DFD were fixed, under RCW 90.03.615. The Determined Future Development plan asserted by the Board does not provide information with regards to:
 - a. Who has equity interested in the water right and who is asserting the plan, in order to determine that the plan is put forth by a party with a vested interest in the water right;
 - b. Evidence showing when a firm and definitive plan was fixed and in what form;
 - c. The scope of this plan, described adequately to determine whether it is of sufficient scope to qualify for a DFD;
 - d. Whether affirmative steps have been taken toward realization of a fixed and definitive plan, and if so when;
 - e. Timeliness for implementing the plan within fifteen years of the most recent beneficial use of the water right.
- 3) The Board has not provided adequate information for Ecology to confirm the Board's analysis of ACQ. The ROE assumes that 2004 – 2008 is the most recent five year period of continuous beneficial use and proceeds to conclude that 2007-2008 are the highest two years of use within the 2004 – 2008 period. Under an ACQ analysis, Ecology cannot reach the same conclusion as the Board, because the ROE does not provide water use information for the 2009, 2010, and 2011 irrigation seasons to assess compliance with RCW 90.03.380(1). Ecology has reviewed aerial photos indicating that at least some irrigation occurred during 2009 – 2011 period; in light of this, more evidence is needed to support the Board's conclusion that 2004 - 2008 as the 'most recent five-year period of continuous beneficial use' under RCW 90.03.380(1).

If a DFD (as suggested in the ROE) were to be documented and established within RCW 90.14.140(2)(c), then we would proceed under RCW 90.03.615, looking to the 'most recent five-year period of continuous beneficial use' preceding when the DFD became fixed. Depending on the determination of DFD and, if so, when such DFD was fixed, it could be appropriate to look to the period of 2004 – 2008 for the purposes of ACQ. Ecology does not have enough information to affirm the Board's conclusion that a DFD was sufficiently established for this purpose. Ecology has requested the water use data for 2009 – 2011 during its review but the Board declined to provide it.

Additionally, two different methods of calculations produced ACQ values which do not coincide with each other: The first calculation relies on water use estimates using a variety of sources, including the Washington Irrigation Guide (WIG), US Bureau of Reclamation AgriMet data, WSU AgWeatherNet Service, and the second uses metering and engineering water use data, including pump station flow, pivot hour meters, tree application analysis. The estimated ACQ numbers obtained via water use estimating for 2004 – 2008 indicate the same calculation of consumptive use each year for pulp trees,

therefore, it is appropriate to assess 2007 – 2008 (3.33 ac-ft/acre) as the highest two years of use. The metering and engineering data, however, show that 2004 (2.87 ac-ft/acre) and 2006 (3.05 ac-ft/acre) are the highest two years of use for the 2004 - 2008 period. Furthermore, the Board's ROE and supplemental information do not contain site specific analysis to justify a 100% consumptive use rate at the existing place of use as applied in the ACQ analysis. Additional information is needed for Ecology to reach a conclusion of what are the highest two years of use within the most recent 5-year period of continuous beneficial use.

- 4) The Board's ROE and supplemental information does not provide sufficient information and analysis for Ecology to affirm the conclusion that there will be no impairment to existing water rights as a result of this change.
 - a. The ROE does not demonstrate how consumptive use will not increase as a result of enabling irrigation of additional acres (spreading from 288 acres to 1,410 acres). Ecology cannot confirm this without additional information on the crop type, water duty, irrigation application method, and other potential factors at the new place of use for the proposed number of acres (1,410 acres). This type of information is necessary to compare existing consumptive use (ACQ) to the proposed consumptive use, thereby demonstrating that consumptive use will not increase. As noted above, the Board's ROE and supplemental information do not contain site specific analysis to justify a 100% consumptive use rate at the existing place of use as applied in the ACQ analysis. An increase of consumptive use as a result of the change may be detrimental to existing water rights and is not allowed under RCW 90.03.380(1). Without this information, Ecology cannot affirm the conclusion that no impairment of existing water rights will result from this action.
 - b. The Board's ROE and supplemental information do not address all the overlapping water rights within the existing place of use for the entire water right located in WRIA 31 or the proposed place of use in WRIA 33. Because the Board assumed the administrative confirmation or division of CS3-22005C(B)@2 was approved, the Board only performed the overlapping water right requirement of WAC 173-153-130(6)(c)(ii) to a reduced footprint of the existing place of use. For example, Surface water right S4-30634C(B) is not mentioned in the ROE and overlaps a significant portion of the place of use for CS3-22005C(B)@2. Without a discrete place of use attributed to the water purchased by T&R Farms under CS3-22005C(B)@2, Ecology cannot determine how the two mentioned water rights will be exercised in conjunction with each other as a result of the water right proposed for transfer (for instance, will the water duty for the overlapping acres be altered as a result of the change) to ensure there is not detriment or injury to existing rights, as required by RCW 90.03.380(1). Without a finalized administrative division, the law requires Ecology to assess the entire water right.

The following is a list of overlapping water rights for the existing place of use for the underlying Surface Water Certificate No. 22005C(B) located in WRIA 31: CS3-22005C@1; CS3-22005C(B)@2; CS4-30634P(B); S4-32981; and S4-35183.

The following is a list of overlapping water rights for the proposed place of use in WRIA 33: S3-30486; CS3-22005C(B)@2; CS4-30634P(B); S3-22005C(B); S4-30634C(B).

Largely CS3-22005C(B)@2 was the only overlapping water right discussed for the existing place of use in WRIA 31 and the proposed place of use in WRIA 33.

YOUR RIGHT TO APPEAL

You have a right to appeal this Order to the Pollution Control Hearing Board (PCHB) within 30 days of the date of receipt of this Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do the following within 30 days of the date of receipt of this Order:

- File your appeal and a copy of this Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.
- Serve a copy of your appeal and this Order on Ecology in paper form - by mail or in person. (See addresses below.) E-mail is not accepted.

You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

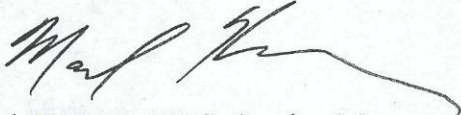
ADDRESS AND LOCATION INFORMATION

Street Addresses	Mailing Addresses
Department of Ecology Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey WA 98503	Department of Ecology Attn: Appeals Processing Desk PO Box 47608 Olympia WA 98504-7608
Pollution Control Hearings Board 1111 Israel Road SW, Ste 301 Tumwater WA 98501	Pollution Control Hearings Board PO Box 40903 Olympia WA 98504-0903

For additional information visit the Environmental Hearings Office Website: <http://www.eho.wa.gov>
To find laws and agency rules visit the Washington State Legislature Website: <http://www.leg.wa.gov/CodeReviser>

If you have any questions or concerns on the above information, please call Melissa Downes at the Department of Ecology at (509)454-4259.

Sincerely,



Mark Kemner, LHG, Section Manager
Water Resources Program/CRO

MK:MD:gg
SharePoint>WR Docs

Enclosure: Your Right To Be Heard

By Certified Mail: 7010 0290 0000 7131 1330

Certified cc: Rick Roeder, Department of Natural Resources, Asset and Property Division
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Luke Maynard, Sandpiper Tree Farm LLC
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cc: Dr. Darryll Olsen, Benton County Water Conservancy Board
Philip Rigdon, Director, Natural Resources Division, Yakama Nation

Bcc (e-copy): Melissa Downes, CRO
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